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Attorneys for Defendant Homecomings Financial, LLC erroneously sued as  
Homecomings Financial Network

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Rosa Galindo; Maria Galindo,

Plaintiffs,

vs.

Financo Financial, Inc.; Patrick  
Patchin; Ahmed Yama Asefi; Aaroon  
Sadat and Nazia Nawabzada;  
Countrywide Bank, N.A.;  
Countrywide Financial Corp.;  
Homecomings Financial Network;  
Commonwealth Land Title Company;  
Joseph Esquivel; Pamela Spikes; and  
Does 1-100,

Defendants.

Case No. 3:07-CV-3991

**DEFENDANT HOMECOMINGS  
FINANCIAL, LLC'S  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION TO STRIKE PORTIONS  
OF PLAINTIFFS' SECOND  
AMENDED COMPLAINT**

[RULE 12(f)]

DATE: February 26, 2008  
TIME: 9:30 a.m.  
PLACE: Courtroom 11

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**I. INTRODUCTION**

Plaintiff Rosa Galindo<sup>1</sup> has sued Defendant Homecomings Financial, LLC (“Homecomings”) in her Second Amended Complaint (“SAC”). She alleged she is entitled to punitive damages. However, she has failed to allege sufficient facts to maintain such a claim. Plaintiff’s allegations do not show that Homecomings did anything that would support a request for punitive damages. Homecomings requests the court strike paragraph 37 and paragraph 9 of the Prayer, both of which contain allegations improperly requesting punitive damages.

**II. PLAINTIFF’S REQUEST FOR PUNITIVE DAMAGES AGAINST HOMECOMINGS SHOULD BE STRICKEN**

Homecomings requests that the court strike the following portions of Plaintiff’s complaint: paragraph 37 and the Prayer paragraph 9.

**A. Legal Standard**

Under FEDERAL RULE OF CIVIL PROCEDURE RULE 12(f), the “court may strike from a pleading . . . any redundant, immaterial, impertinent, or scandalous matter.” A motion to strike may be used to strike a request for damages that are not recoverable as a matter of law. *Bureerong v. Uvawas*, 922 F.Supp. 1450, 1479, fn. 34 (C.D. Cal. 1986). A request for punitive damages in a California law claim generally is substantively governed by California law, although the federal pleading standards of FEDERAL RULES OF CIVIL PROCEDURE, RULES 8 and 9 apply. *Jackson v. East Bay Hosp.*, 980 F.Supp. 1341, 1354 (N.D. Cal. 1997).

**B. Punitive Damages Are Not Available Under Plaintiff’s TILA Claim**

Plaintiff specifically requests punitive damages under TILA. (SAC ¶37.) This request should be stricken for a simple reason—punitive damages are not available under TILA. *See e.g., Smith v. Capital Roofing Co. of Jackson, Inc.*, 622

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<sup>1</sup> Plaintiff Maria Galindo was not involved in any transactions with Defendant Homecomings Financial, LLC and so therefore has no claims against Homecomings.

1 F.Supp. 191, 195-196 (D. Miss. 1985); *see also*, 15 U.S.C. § 1640(a). The TILA  
 2 statue provides for the full panoply of damages available to Plaintiff and punitive  
 3 damages is not an option. 15 U.S.C. § 1640(a). Paragraph 37 should be stricken  
 4 from the SAC.

5 **C. Punitive Damages Are Not Available under Any Other Claim**

6 Plaintiff also requests punitive damages generally in the prayer to her SAC.  
 7 However, punitive damages are not merited under any of her claims. As mentioned,  
 8 she cannot request punitive damages against Homecomings on a TILA claim. She  
 9 also cannot request punitive damages under her federal RESPA claim. Punitive  
 10 damages are not available under RESPA. *Mullinax v. Radian Guar. Inc.*, 199  
 11 F.Supp.2d 311, 319 (M.D. N.C. 2002).

12 Likewise, Plaintiff is also not entitled to punitive damages under virtually all  
 13 of her state law claims. Punitive damages are not merited for mere negligence. An  
 14 award of punitive damages requires “[s]omething more than the mere commission  
 15 of a tort.” [internal quotations and citations omitted.] *Gawara v. United States*  
 16 *Brass Corp.*, 63 Cal.App.4th 1341, 1361-62, 74 Cal.Rptr.2d 663 (1998). “Simple  
 17 negligence cannot support an award of punitive damages.” *Jackson v. Johnson*, 5  
 18 Cal.App.4th 1350, 1354-55, 7 Cal.Rptr.2d 482 (1992). Plaintiff has not alleged  
 19 anything more than negligence. Conspiracy is not even an independent claim, so  
 20 alone, it cannot serve as the basis for punitive damages. *See Applied Equipment*  
 21 *Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.4th 503, 510, 28 Cal.Rptr.2d 475 (1994).  
 22 California CIVIL CODE §1921(b) sets forth the allowable damages and relief for a  
 23 violation; punitive damages are not specified. Finally, a claim for punitive damages  
 24 under BUSINESS AND PROFESSIONS CODE §17200 must be stricken. Monetary  
 25 damages, including punitive damages, are simply not available under BUSINESS AND  
 26 PROFESSIONS CODE §17200. *Korea Supply Co. v. Lockheed Martin Corp.*, 29  
 27 Cal.4th 1134, 1148, 131 Cal.Rptr.2d 29 (2003); BUS. AND PROF. CODE §§17203,  
 28 17204, 17206; *Czechowski v. Tandy Corp.*, 731 F.Supp. 406, 410 (N.D. Cal. 1990);

1 *Southwest Marine, Inc. v. Triple A Machine Shop, Inc.*, 720 F.Supp. 805, 810 (N.D.  
 2 Cal. 1990); *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*,  
 3 20 Cal.4th 163, 179, 83 Cal.Rptr.2d 548 (1999); *Kasky v. Nike, Inc.*, 27 Cal.4th 939,  
 4 950, 119 Cal.Rptr.2d 296 (2002).

5 Further, leaving aside the legal “bans” against punitive damages stated above,  
 6 Plaintiff has not alleged sufficient facts to support a request for punitive damages  
 7 against Homecomings under any claim. California law disfavors punitive damages  
 8 and such claims are carefully scrutinized. *G.D. Searle and Co. v. Superior Court*,  
 9 49 Cal.App.3d 22, 122 Cal.Rptr. 218 (1974). Allegations demanding punitive  
 10 damages are improper if they are unsupported by sufficient facts. *Dawes v.*  
 11 *Superior Court*, 111 Cal.App.3d 82, 85 (1980). If the allegations are unsupported,  
 12 the punitive damage request is irrelevant and improper and, therefore, subject to a  
 13 motion to strike. Specific facts must be alleged from which malice can be inferred  
 14 to support a claim for punitive damages. *G.D. Searle*, 49 Cal.App.3d at 32-33;  
 15 *Grieves v. Superior Court*, 157 Cal.App.3d 159, 166-167, 203 Cal.Rptr. 556 (1984).  
 16 Plaintiff has not done this.

17 Plaintiff also fails to allege any facts that meet the requirements for requesting  
 18 punitive damages. Under California CIVIL CODE §3294(a), a plaintiff can only  
 19 receive punitive or exemplary damages if she proves by “clear and convincing  
 20 evidence that the defendant has been guilty of oppression, fraud, or malice.” Malice  
 21 is defined as “conduct which is intended by the defendant to cause injury to the  
 22 plaintiff or despicable conduct which is carried on by the defendant with a willful  
 23 and conscious disregard of the rights or safety of others.” (CIV. CODE §3294(c)(1).)  
 24 Oppression is “despicable conduct that subjects a person to cruel and unjust  
 25 hardship in conscious disregard of that person's rights.” Despicable means  
 26 circumstances that are base, vile, or contemptible. *Cloud v. Casey*, 76 Cal.App.4th  
 27 895, 912, 90 Cal.Rptr.2d 757 (1999). The requirement of “despicable” conduct  
 28 represents a “substantive limitation on punitive damage awards.” *College Hospital*



1 *Inc. v. Superior Court*, 8 Cal.4th 704, 725, 34 Cal.Rptr.2d 898 (1994). The courts  
2 have set a high burden:

3 Such damages are never awarded as a matter of right.  
4 They are not favored by the law and they should be  
5 granted with the greatest of caution; they will be allowed  
6 only in the clearest of cases. To justify their award, there  
7 must be proof of malice in fact; such malice will not be  
8 implied by law; and such malice will never be established  
9 by “mere speculation.” The malice essential to an award  
10 of exemplary damages requires an evil motive or intent; it  
11 “denotes ill will on the part of the defendant, or his desire  
12 to do harm for the mere satisfaction of doing it.” Essential  
13 to any award of exemplary damages is a finding that the  
14 plaintiff was subjected to “cruel and unjust hardship” by  
15 the defendant. And, in any case, the evil motive and  
16 desire to harm to plaintiff must be attended by “outrageous  
17 conduct.”

18 *Henderson v. Security National Bank*, 72 Cal.App.3d 764, 771-772, 140 Cal.Rptr.  
19 388 (1977).

20 Again, Plaintiff has not alleged any facts showing malice, despicable conduct  
21 or oppression. Moreover, Plaintiff’s allegations for punitive damages are  
22 conclusory—she does not allege any reasons for the request. “[T]he second count's  
23 conclusory characterization of defendant's conduct as intentional, willful and  
24 fraudulent is a patently insufficient statement of ‘oppression, fraud, or malice,  
25 express or implied,’ within the meaning of section 3294.” *Brousseau v. Jarrett*, 73  
26 Cal.App.3d 864, 872, 141 Cal.Rptr. 200 (1977).

27 Thus, paragraph 37 and the Prayer paragraph 9 should be stricken.

### 28 **III. CONCLUSION**

Plaintiff’s requests for punitive damages in paragraph 37 and in the Prayer are

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1 legally and factually barred and/or insufficient, and, as to Homecomings, paragraph  
2 37 and the Prayer for punitive damages should be stricken.

3  
4 DATED: January 15, 2008

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6 By /s/ Frederick A. Haist  
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